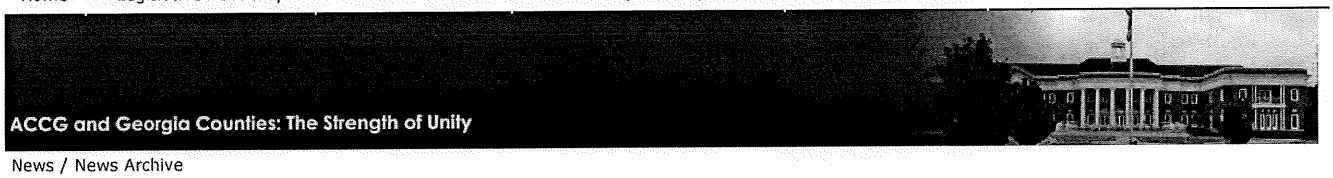

Have a sign ordinance? Adopt a moratorium now!

HAVE A SIGN ORDINANCE? ADOPT A MORATORIUM NOW!

United States Supreme Court Opinion Could Render "Thousands" of Sign Ordinances Unconstitutional

The United States Supreme Court has issued a ruling that several justices acknowledged will render "thousands" of sign ordinances vulnerable to attack under the First Amendment. The particular provision at issue in Reed v. Town of Gilbert, 2015 WL 2473374, limited the size, location and duration of directional signs for temporary events, which were treated differently from "Political Signs" and "Ideological Signs." Although the regulations applied regardless of the event being held, the Supreme Court determined that the provision was based on its content, and therefore subject to the highest level of review under the First Amendment. Termed "strict scrutiny," this standard means that provisions are deemed "presumptively unconstitutional," with the burden on the government to show that the regulation is necessary to meet a compelling governmental interest – a standard that is virtually impossible to meet.

The sign ordinance at issue contained provisions regulating "Political Signs", "Temporary Directional Signs" and "Ideological Signs" by different standards. The ordinance defined a "Political Sign" as any "temporary sign designed to influence the outcome of an election called by a public body", "Ideological Sign" as any "sign communicating a message or ideas for noncommercial purposes that is not" certain other types of noncommercial signs, including a Temporary Directional Sign Relating to a Qualifying Event, and "Temporary Directional Signs" as any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" was any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."

The petitioners, a church and its pastor, challenged the provisions relating to the Temporary Directional Signs on the ground that these types of signs were subject to more onerous regulations than Political Signs and Ideological Signs, and that these different regulations were content-based and thus violated the First Amendment. The Ninth Circuit ruled that these regulations were not content-based and were valid content-neutral regulations.

Reversing the Ninth Circuit, the Supreme Court held that the provisions at issue were content-based on their face because they applied different regulations to different types of signs based on the message conveyed. The Court also held that, because the provisions were content-based on their face, it did not need to consider the Town's justifications or purposes for enacting the sign ordinance in order to determine whether the ordinance was subject to strict scrutiny. The Court then held that the ordinance did not survive strict scrutiny.

The Court stated that its opinion still left the Town with "ample" content-neutral options for regulating signs to advance its interests in safety and aesthetics, such as regulations based on size, lighting, portability and other factors. The Court also noted that the Town could "almost entirely prohibit signs on public property if it did so in a content-neutral manner. In addition, the Court suggested that certain types of safety signs, such as warning signs marking hazards on private property or signs directing traffic, may survive strict scrutiny.

A concurring opinion authored by Justice Alito and joined by Justices Kennedy and Sotomayor (all three of whom joined the majority opinion too), offered "a few words of further explanation" and stated that the Court's opinion will not leave local governments powerless to enact and enforce reasonable sign regulations. Justice Alito's concurring opinion, while disclaiming any attempt to provide a comprehensive list, identified several types of regulations that would not be subject to strict scrutiny. Proper areas of regulation included: (1) size; (2) location , such as free-standing signs versus those attached to buildings; (3) illumination; (4) animation (electronic vs. static); (5) placement of signs on private and public property; (6) placement of signs on residential or commercial property; (7) on-premises and off-premises signs; (8) number of signs along a roadway; and (9) time limitations on signs advertising a one-time event. Justice Alito's concurring opinion also emphasized that local governments could display their own signs to promote safety, such as directional signs and sign pointing out historic sites and scenic spots.

Another concurring opinion, authored by Justice Kagan and joined by Justices Breyer and Ginsburg, agreed that the regulations at issue were invalid under the First Amendment, but on the ground that they failed intermediate scrutiny as a content-neutral time, place and manner regulation. Justice Kagan warned that, notwithstanding the assurances contained in the majority opinion and Justice Alito's concurring opinion, "thousands" of sign ordinances around the country could be deemed content-based and subject to strict scrutiny as a result of the Court's opinion, even though such local sign ordinances do not threaten core First Amendment values. Justice Kagan also warned that the Court "may soon find itself a veritable Supreme Board of Sign Review" as a result of the Court's opinion. Justice Breyer wrote a separate concurring opinion criticizing the majority's application of strict scrutiny to the sign ordinance at issue.

So where does that leave local governments? The best course of action is to adopt a moratorium on the erection of all signs in your jurisdiction while your counsel reviews the sign ordinance. It is very difficult to predict how lower courts will apply this case as there appear to be inconsistencies within the majority opinion. Additionally, while the majority opinion is joined by six justices, three of the six participated in a concurring opinion that qualified the majority opinion. It appears only a minority of the justices believe "if you have to read it, it is content based and invalid." At this point, however, an ordinance that regulates size, height, and location, with limited distinctions between commercial and noncommercial speech appears to be the safest approach.

FMG's Governmental Liability practice group has sample ordinances that might be a helpful starting place for cities and counties in drafting a new ordinance. Please contact Dana Maine, dmaine@fmglaw.com, (770) 818-1408, for further assistance.

Note: FMG partner Philip Savrin argued Reed before the United States Supreme Court, with the assistance of Dana Maine and Bill Buechner.